Supreme Court, U.S.
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No. 88-2110

In The

Supreme Court of the United States

October Term, 1988

THE CITY OF MACON, GEORGIA,

Petitioner,

vs.

PASCO BUILDING SYSTEMS, A Division of AMCORD, INC., and DELTA ASSOCIATES, INC.,

Respondents.

On Petition for Writ of Certiorari to Supreme Court of Georgia

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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1709.

QUESTIONS PRESENTED

The respondent shows this honorable Court that the petitioner's statement of the questions presented fails to meet the requirements of the Rules of the Supreme Court 21.1(a) and 21.5, in that the statements are repetitious, argumentative, and neither concise nor short. As set out in the argument below, respondent shows this honorable Court that there is no federal question involved in the present case.

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JURISDICTIONAL STATEMENT

The respondent shows this honorable Court that jurisdiction is lacking, in that no substantial federal question is present in this case. Although the Georgia Court of Appeals decision is a final one, it is based squarely upon state law grounds and does not meet the standard of a reviewable decision set out in 28 U.S.C. §1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The respondent shows this honorable Court that only Georgia law is the basis of the Georgia Court of Appeals opinion. See, Appendix to Petition for Certiorari, A2, A3.

O.C.G.A. §9-12-40:

> A judgment of a court of competent jurisdiction shall be conclusive between the same parties and their privies as to all matters put in issue or, which under the rules of law, might have been put in issue in the case wherein the judgment was rendered until the judgment is reversed or set aside.

No federal constitution or statutory provisions are at issue.

CONCISE STATEMENT OF THE CASE AND STATEMENT OF FACTS

The petitioner's Statement of the Facts and Statement of the Case is encumbered by irrelevant and disputed facts, while omitting mention of important undeniable

matters upon which the Georgia Court of Appeals actually based its opinion. For example, the substantial "history" dredged from the testimony of Tom Moody is neither relevant to the issues, nor necessary for an understanding of the grant of the respondent's motion for summary judgment. (See Petitioner's Brief at pages 5 - 7.)

Here is the statement of material facts, with citations to the record, upon which the Georgia Court of Appeals' decision was actually based:

1.

The City of Macon (hereinafter sometimes referred to as "the City") is a city chartered by Act of the Georgia Legislature. 1977 Ga. Laws 3776. The Macon-Bibb County Industrial Authority (hereinafter sometimes referred to as "the Authority") is a public body corporate and politic and an instrumentality of the City of Macon, created by Act of the General Assembly in 1962.

2.

The City owned the real property on which the hangar at issue was built and leased this property to the Authority under a resolution adopted January 9, 1979. The "Lease Agreement and Contract" was entered on November 1, 1979. (*See*, Plaintiff's Answers to First Interrogatories of Defendant Delta Associates, Inc., Interrogatory No. 10, R-212 and R-224.)

3.

The Lease Agreement and Contract between the City and the Authority expressly states that, during the term of the lease (November 1, 1979 to November 1, 1994), any buildings or other improvements built by the Authority

shall remain the sole property of the Authority and shall not constitute part of the leased land. (Lease Agreement and Contract, Article III, §3.1; R-232.)

4.

In the Lease Agreement and Contract between the City and the Authority, the Authority pledged the rentals received from its leases to the payment of the principal and interest on bonds it issued to build the hangar in question. (Lease Agreement and Contract, Article II, §2.2(e), Article III, §3.5, R-232 and 235, respectively.)

5.

The Authority, as "owner", contracted with Warren Associates, Inc. for the construction of the "pre-engineered metal aircraft hangar and office/shop complex" on September 6, 1979. The City was not a party to that contract. ("Contract" between Warren Associates, Inc. and Macon-Bibb County Industrial Authority, R-161).

6.

No property rights in the hangar belonging to the Authority were assigned, transferred or conveyed to the City. (Plaintiff's Answers to First Interrogatories of Defendant Delta Associates, Inc., No. 10, R-212.)

7.

The Authority, as owner, executed an "Owner-Engineer Agreement", entitled "Standard Form of Agreement Between Owner and Engineer for Professional Services Between Macon-Bibb County Industrial Authority and Delta Associates, Inc. for Construction of Hawaiian Air Cargo Maintenance Hangar Complex, Lewis B. Wilson

Airport, Delta No. Ga. 7908-C". (Plaintiff's Answers to First Interrogatories of Defendant Delta Associates, Inc., No. 9, R-211.)

8.

The Authority, as owner, executed a Certificate of Substantial Completion with Warren Associates, Inc. on June 28, 1980 for the project "Hawaiian Air Cargo Hangar, Lewis B. Wilson Airport, Macon, Georgia". (Certificate of Substantial Completion, R-164.)

9.

The Authority, on behalf of the City, caused the construction of the pre-engineered metal aircraft hangar with office and shop complex on land owned by the City at the Lewis B. Wilson Airport in Macon. (Complaint, paragraph 3, R-3-4.)

10.

Pasco Building Systems designed, manufactured and fabricated the materials with which the hangar structure was constructed. (Complaint, paragraph 4, R-4.)

11.

After the hangar collapse in a windstorm on or about March 21, 1982, the Authority, as owner, executed a Demolition Services Contract with Warren Associates, Inc. on April 29, 1982. (*See*, Demolition Services Contract, R-242.)

12.

A Lease Agreement entered into by and between the City, the Authority and Hawaiian Airlines was executed

on or about September 5, 1979. Thereafter, the facility was subleased from Hawaiian Airlines to Zantop International Airlines, Inc., on or about September 2, 1980. Later amendments to these Lease Agreements were entered on October 4, 1982 and September 12, 1983. (*See*, Plaintiff's Answers to the First Interrogatories of Defendant Delta Associates, Inc., No. 10, R-212.)

13.

A loan receipt was executed by the Authority and the City dated July 14, 1983 with respect to this hangar. The loan receipt pledges the loan amount to be repaid from any recovery which the "City of Macon and or the Macon-Bibb County Industrial Authority" might obtain from third parties. (R-175.)

14.

Both the City and the Authority are named as insureds under the City's policy for hazard insurance to the hangar in question. (*See*, Plaintiff's Responses to Defendant Delta Associates, Inc.'s First Interrogatories, No. 11, R-214.)

15.

The Insurance Company of North America made payments totalling $730,068.28 to or on behalf of the City and the Authority for the loss of the hangar and debris removal. (Responses of Plaintiff to First Interrogatories of Pasco Building Systems, No. 10, R-190.) Both the City and the Authority executed a "Sworn Statement in Proof of Loss" on July 14, 1985. (R-173.)

16.

In its Complaint in the case at bar, the City of Macon sued Pasco Building Systems and Delta Associates, Inc., alleging that "as a direct and proximate consequence of the defendants' joint and several negligent acts and omissions, the plaintiff has sustained damages for the loss of income from the lease and sub-lease of the hangar." (Complaint, paragraph 8, R-5.)

17.

Specifically, the damages sought by the City of Macon against this defendant include $848,230.00 for loss of the hangar structure; $730,068.28 for reconstruction costs; and $140,038.53 for loss of income from the lease and sub-lease of the subject hangar. (*See*, Responses of Plaintiff to First Interrogatories of Pasco Building Systems, Response No. 11, R-191.)

18.

At the time the City filed the present lawsuit against these defendants, a "related case" was pending in the United States District Court for the Middle District of Georgia, Columbus Division, Case No. 83-158-COL: "Zantop International Airlines, Inc. and Puritan Insurance Company, Plaintiffs v. Delta Associates, Pasco Building Systems, **Macon-Bibb County Industrial Authority**, Warren Associates, Southeastern Building Services, Burdeshaw & Johnson, P.C., Georgia Steel and Georgia Structural, Defendants." (emphasis added) (*See*, Plaintiff's Answers to First Interrogatories of Defendant Delta Associates, Inc., "introductory notes," R-199; and certified

copies of the federal court suit, R-127 to 160.) The City refers to this lawsuit as the "Zantop litigation".

19.

In the Zantop litigation, Zantop International Airlines sued the defendants for negligence alleged to have caused damage to certain aircraft housed in the hangar. (*See*, certified copy of the Amended Complaint, paragraphs 23, 25, and 26, R-155 to 156.) The Authority acknowledged service in the Zantop litigation and entered into a stipulation which provided it an extension of time "to file any and all pleadings, defenses, *cross-claims*, motions and any other defenses." (*See*, certified copies of Acknowledgment of Service and Stipulation as to Extension of Time and Order thereon, filed November 16, 1983, R-147 and 148.)

20.

The Authority cross-claimed against Pasco Building Systems in the Zantop litigation for indemnity. (*See*, "Separate Defenses and Cross-Claim of Defendant Macon-Bibb County Industrial Authority to Amended Complaint of Plaintiffs," originally filed December 28, 1983 and refiled May 23, 1984, with certified copy of the records from Zantop litigation, R-139 and 131, respectively.)

21.

In response to Zantop's allegations of negligence in the "Zantop litigation" (including allegations of negligence by Pasco), the Authority answered as follows:

> This defendant **denies** paragraph 25 in its entirety including subparagraphs (a) through (g) thereunder. This defendant specifically says that it has not been

> negligent in any manner whatsoever. (emphasis added)

(Separate Defenses and Cross-Claim of Defendant, Macon-Bibb County Industrial Authority to Amended Complaint of Plaintiffs, paragraph 25, filed December 28, 1983, and again May 23, 1984, R-139 and 131.)

22.

The Zantop litigation resulted in a defendant's verdict, after a two-week jury trial, finding no negligence on the part of any of the defendants. (*See*, certified copies of "Judgment in a Civil Case" and "Verdict" in the Zantop litigation, R-129 and 130.)

ARGUMENT AND CITATION OF AUTHORITY

Succinctly stated, the Georgia Court of Appeals was correct in affirming the trial court's grant of summary judgment to the respondents because the City was, and is, in privity with the Authority and its claims are therefore barred by Georgia's doctrine of estoppel by judgment. O.C.G.A. §9-12-40. As this relates to the propriety of a writ of certiorari by this Court, there simply is no substantial federal question at issue in the case. 28 U.S.C. §1257. On its face, the Georgia Court of Appeals' decision is based squarely upon O.C.G.A. §9-12-40. (See, Appendix to the Petition for Certiorari, the opinion of the Georgia Court of Appeals, pages A-2, paragraph 2; and A-3, paragraph 2.) The petition fails to show a case within 28 U.S.C. §1257.

Leaning very heavily on *Hanna v. Plumer*, 380 U.S. 460, 85 S.Ct. 1136, 14 L.Ed.2d 8 (1965), the petitioner seeks to present a conflict between a state and federal procedural rule. The petitioner seizes upon the fact that a cross-claim by the Authority was "permissive" under the Federal Rules of Civil Procedure and that, therefore, it should not be barred because of its absence in the prior federal court suit, based upon O.C.G.A. §9-12-40. But, as petitioner itself recognizes, it was not *necessarily* what failed to appear in the prior federal court suit (the permissive cross-claim) that bars the City now; it is what did appear there: a denial of negligence on the part of any defendant by the same party who subsequently wants the opportunity to prove negligence on the part of the defendants.

There is a certain irony in the petitioner's bold and hardy assertion of the federal procedural rules over any Georgia rule which might be contrary. It is, after all, the dignity and finality of the federal court's judgment that the respondent asserted and the trial court recognized. The Federal Rules of Civil Procedure 13 and O.C.G.A. §9-11-13 are substantially identical. The result would have been the same if the Zantop litigation had been in state court. There simply is no *Hanna v. Plumer* conflict between a state and federal rule.

In *Pope v. City of Alexander*, 240 Ga. 177, 240 S.E.2d 241 (1977), the Georgia Supreme Court held that the state courts of Georgia would use the same rules as the federal court in determining whether an issue could have been raised in that court's litigation. Under the Federal Rules of Civil Procedure, the Authority could have cross-

claimed against Pasco for damages to its ownership interest and, as an agent for the City, for any damage to the City's interests caused by Pasco's alleged negligence. The Authority did, in fact, cross-claim for indemnity but did not add its own property damage claims, even though it was given an extension of time to add any claims it had against Pasco. (*See*, R-139 and R-131.)

Under federal rules, if cross-claims arise out of the main transaction or occurrence, they are ancillary to it and federal jurisdiction will not fail when they are asserted. *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 105 S.Ct. 1245, 84 L.Ed.2d 169 (1985). *Pope, supra*, held that the key to whether the claim was barred by *res judicata* in Georgia is whether the federal court would have exercised its pendant jurisdiction. *Id.* at 179. Even without the inconsistency in pleading shown above, since the Authority *could* have, but did not, raise the present claims, they are now barred by the prior judgment. O.C.G.A. §9-12-40.

There is no such thing, under the Georgia Civil Practice Act or the Federal Rules of Civil Procedure called a "compulsory cross-claim." Yet, O.C.G.A. §9-12-40 bars claims that *could* have been raised, the procedural rules notwithstanding. One must review substantive law to determine estoppel, not merely rely on an omission in the procedural rules. This construction of Georgia's estoppel by judgment rule is neither aberrant nor novel. *Citizens Exchange Bank of Pearson v. Kirkland*, 256 Ga. 71, 344 S.E.2d 409 (1986); ("Mrs. Kirkland, the plaintiff here, could have raised the issue of her codefendant's negligence by way

of cross-claim in the previous action."); *Monroe v. Lubonnic*, 174 Ga. App. 191, 329 S.E.2d 583 (1985); and *Roberts v. Hill*, 81 Ga. App. 185, 186, 58 S.E.2d 465 (1950).

The City stumbles over the word "permissive" in the newer Federal Rules of Civil Procedure and concludes that the procedural rule worked a substantive change on what has always been Georgia's estoppel rule. In fact, the procedural rules are nothing more than "housekeeping" rules and could never rise to the level of altering vintage substantive Georgia law in a diversity case. "[The FRCP] shall not abridge, enlarge, or modify the substantive right[s]." 28 U.S.C. §2072. The federal procedural rule may call the Authority's claims "permissive", but the substantive law deems them necessary to further its policy as articulated in O.C.G.A. §9-12-40, *Kirkland and Morris, supra.*

CONCLUSION

Because the decision of which the petitioner seeks review by writ of certiorari is based upon the state law grounds of O.C.G.A. §9-12-40 and raises no substantial federal question, the petition for writ of certiorari should be denied.

Dated July 27, 1989.

Respectfully Submitted,

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